

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Quality considerations in the zero-price economy – Note by the European Union****28 November 2018**

This document reproduces a written contribution from the European Union submitted for item 2 of the joint meeting between the Competition Committee and the Committee on Consumer Policy on 28 November 2018.

More documentation related to this discussion can be found at:

www.oecd.org/daf/competition/quality-considerations-in-the-zero-price-economy.htm

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1. EU competition law is not only concerned with price, but with all five parameters of competition – price, output, quality, choice, and innovation.² This applies to the enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereafter Articles 101 and 102) as well as EU merger control under the EU Merger Regulation.³

2. This contribution focuses on quality considerations in competition cases involving digital zero-price services. In the digital sector, when there is no price expressed in money, and output does not play a decisive role (since marginal costs are often very low), there is a strong case for competition law to focus on the other three parameters of competition: quality, choice and innovation.

3. Part 1 provides some background on business models and services. Part 2 explains that EU competition law, EU data protection law, and EU consumer protection law all explicitly cover zero-price services. Part 3 covers market definition and market shares for zero-price services in competition cases. Part 4 focuses on competitive effects in terms of the quality for zero-price services. This includes harm to quality as well as the reverse, quality improvements as efficiencies. Part 5 recalls key EU antitrust cases concerning the quality of digital zero-price services. (Under EU competition law, "antitrust" refers to the rules on anti-competitive agreements and abuses, not merger control.) Part 6 recalls relevant merger cases.

1. Background

4. There are several types of "zero-price" markets, such as markets for open-source software, other digital services, TV and radio, some sports competitions, and some waste management and recycling markets. It may be more appropriate to refer to "zero-price" *services* rather than "zero-price" *markets*, as many free services compete with non-free services, as in the media and software sectors, for example.

5. There are several "zero-price" models as well: providing a product for free in order to charge for complements; giving a basic version of a product for free in the hope that

¹ Directorate-General for Competition, European Commission (hereafter "the Commission").

² See e.g. C-413/14 *Intel*, ECLI:EU:C:2017:632, para. 134; C-382/12 P *Mastercard*, ECLI:EU:C:2014:2201, para. 93; C-413/06 P *Bertelsmann*, ECLI:EU:C:2008:392, para. 121; T-168/01 *Glaxo*, ECLI:EU:T:2006:265, para. 106; Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJEU C 11, 14.1.2011, p. 1, paragraph 27; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJEU C 45, 24.2.2009, p. 7, paragraph 11; and Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEU C 31, 5.2.2004, p. 5, paragraph 8.

³ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1.

some consumers will at a later stage decide to pay for a more sophisticated version (the "freemium" model); giving a product for free while soliciting donations (the Wikipedia model); and supplying a product for free on one side of the market while selling advertising on the other side (the "two-sided", "ad-supported" model).⁴

6. Many such services rely on the online ad-supported model. As the invitation letter for this meeting put it, online advertising is "the primary enabler of zero price services". Similarly, the group of EU Member States' data protection authorities has stated that the online advertising model is "the fundamental business model of the internet".⁵ A large part of online advertising today is "targeted" advertising, i.e. advertising tailored to fit a person's interests, as indicated by that person's personal data collected over the internet or from other sources.

7. Some zero-price services collect data from consumers not only to improve targeted advertising, but also to improve their core functionalities – such as search accuracy or media recommendations – in order to attract more consumers and therefore produce more monetisation opportunities through advertising. For example, as the Commission put it in the *Google Shopping* decision, "While users do not pay a monetary consideration for the use of general search services, they contribute to the monetisation of the service by providing data with each query".⁶ Those data points contribute to building personal profiles of people for targeted advertising purposes, but they also contribute to improving the accuracy of search results.

8. In this context, some consumers may experience data collection and data protection as elements of the quality of a zero-price service.

2. EU competition law, EU data protection law, and EU consumer protection law all explicitly cover zero-price services

9. Under EU competition law, the argument that a service which is "provided free of charge" is not subject to the EU competition rules was rejected as early as 1991, in the *Höfner* judgment, in relation to Germany's public-sector job placement agency.⁷ The EU courts have confirmed this principle on several occasions since then.⁸ Many EU competition law cases – both antitrust cases and merger cases – concern zero-price services. Those cases are outlined in parts 5 and 6 below.

⁴ Both the ad-supported business model and targeted advertising have existed for a long time. The radio and free newspapers rely on ads, as does free-to-air TV. Some radio and TV shows are conducive to targeted advertising, based on surveys of typical audiences for those shows. Some companies provide bus stops and bike sharing schemes to cities for free, in exchange for the right to use them to sell advertising.

⁵ Article 29 Working Party, opinion 03/2013 on purpose limitation, document no. 00569/13/EN, WP 203, 2 April 2013.

⁶ Commission decision of 27.06.2017 in case 39740 *Google Search (Shopping)*, para. 320.

⁷ See case C-41/90 *Höfner and Elser v Macrotron*, ECLI:EU:C:1991:161, paras. 19-23.

⁸ See e.g. case T-201/04 *Microsoft*, ECLI:EU:T:2007:289, para. 969; and case T-79/12 *Cisco*, ECLI:EU:T:2013:635, para. 73.

10. The same applies under EU data protection law and, to a degree, under EU consumer protection law.

11. Under EU data protection law, the General Data Protection Regulation (GDPR) applies also to the processing of personal data of individuals who are in the EU by service providers that are not established in the EU but is related to the offering of products or services to individuals in the EU "irrespective of whether a payment of the data subject is required".⁹ The scope of the proposal for a E-Privacy Regulation contains a similar point.¹⁰

12. Not only does EU data protection law cover markets where consumers "pay with their data", but EU data protection law ensures that consumers cannot be obliged to pay with their personal data. Based on the interpretation of Article 7(4) GDPR, the Article 29 Working Party concluded that the GDPR seeks to ensure that the purpose of personal data processing is not disguised or bundled with the provision of a contract for a service for which additional personal data are not necessary. Consent is therefore only a valid lawful ground for processing personal data where the data subject has a genuine choice between a service that includes consenting to the use of personal data for additional purposes on the one hand, and an equivalent service offered by the same controller that does not involve consenting to data use for additional purposes on the other hand. There must be a possibility to have the service delivered by this controller without consenting to the other or additional use in question.¹¹

13. Under EU consumer protection law, the Commission's 2016 guidance on the Unfair Commercial Practices Directive (UCPD) states that "the marketing of such products as 'free' without telling consumers how their preferences, personal data and user-generated content are going to be used could in some circumstances be considered a misleading practice."¹²

14. Likewise, the Commission's 2015 proposal for a directive on contracts for the supply of digital content, for the first time, explicitly "covers digital content supplied not only for a monetary payment but also in exchange for (personal and other) data provided by consumers, except where the data have been collected for the sole purpose of meeting legal requirements".¹³ Consequently, under the proposal, consumers are equally protected

⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation or "GDPR"), OJ L 119, 4.5.2016, p. 1, Article 3(2)(a).

¹⁰ Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), document no. COM(2017) 10 final, 2017/0003 (COD), 10 January 2017, Article 3(1)(a).

¹¹ See Article 29 Working Party, Guidelines on consent under Regulation 2016/679 as last revised and adopted on 10.4.2018 (WP259 rev.01), p. 8-10, endorsed by the European Data Protection Board.

¹² Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, document SWD(2016)163 Final, 25 May 2016, page 97.

¹³ Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, document no. COM/2015/0634 final, 2015/0287 (COD), 9 December 2015, recitals 13-14 and Articles 3 and 13.

against malfunctioning digital content and digital services independently of whether the consumer provides a monetary payment or enjoys data-driven zero-price services.

15. Similarly, the Commission's recent proposal for a directive "as regards better enforcement and modernisation of EU consumer protection rules" proposes to extend the scope of the existing Consumer Rights Directive to

*"digital services for which consumers do not pay money but provide personal data, such as: cloud storage, social media and email accounts. Given the increasing economic value of personal data, those services cannot be regarded as simply 'free'. Consumers should therefore have the same right to pre-contractual information and to cancel the contract within a 14-day right of withdrawal period, regardless of whether they pay for the service with money or provide personal data."*¹⁴

3. Market definition and market shares for zero-price services

16. Traditional market definition relies on the "small but significant non-transitory increase in price" ("SSNIP") test. The SSNIP test asks whether, if the price of service A were to increase by 5 to 10%, consumers would switch to service B, in which case B belongs in the same relevant market as A.¹⁵

17. It is sometimes argued that it is difficult to apply the SSNIP test to zero-price services, because a price of zero increased by a certain percentage is still zero.

18. An alternative would be to construe a SSNIP as a hypothetical price increase above zero, such as charging 1 euro instead of zero. However, this is unlikely to work either, as a price of "zero" is exceptionally attractive not only because it is inexpensive, but also because of at least two other reasons.

- First, a zero-price service does not require any investment or commitment. Since the price is zero, why not try it? The consumer does not feel that she has to learn to use the product, or to keep using it, or to use it intensively. That is why zero-price services are especially prone to multi-homing, since consumers do not necessarily feel that they "invested" in a particular service.

¹⁴ Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules, document no. COM/2018/0185 final 2018/090, 11 April 2018, part 1.1.

¹⁵ Commission Notice on the definition of relevant market for the purposes of Community competition law (Market Definition Notice), OJ C 372, 9.12.1997, p. 5.

- Second, by definition, zero-price services involve reduced transaction costs when it comes to payment. Many people value the fact that there is no need to fill in their credit card number online: it saves time and there is no risk of payment fraud.^{16 17}

19. Because a zero-price service "A" is exceptionally attractive for these reasons, a SSNIP test based on comparing it to a service "B" – which also has a price of zero in reality, but is hypothetically priced at 1 euro for the purpose of the SSNIP test – is likely to understate the amount of switching to service "B". This would produce an excessively narrow market definition. This, in turn, would overstate dominance for Article 102 purposes, but understate overlaps for merger control purposes.

20. In any event, EU competition law does not require using the SSNIP test to define the relevant market. The 1997 Market Definition Notice mentions that the SSNIP test is merely "one way" of defining markets, and that several market definition methods are possible.¹⁸ The case-law confirms this. In the *Topps* judgment, the EU General Court noted that the SSNIP test

*"is not the only method available to the Commission. ... The SSNIP test may also prove unsuitable in certain cases, for example ... where there are free goods or goods the cost of which is not borne by those determining the demand."*¹⁹

21. In such situations, it is often possible to define the relevant market even though there is no price, for example by reference to a product's characteristics or intended use. Indeed, according to the Commission, when it comes to defining markets, "the most common and more easily available evidence is of a qualitative nature".²⁰

22. In response to the problem of using the SSNIP test for zero-price services, it has also been suggested that competition authorities could use the "small but significant non-transitory decrease in quality" (SSNDQ) test instead, which was in practice part of the conceptual framework used for the assessment of dominance in the recent Google Android Decision.

23. The key elements of market definition in the main relevant antitrust and merger cases are outlined in parts 5 and 6 below.

24. Finally, since market shares in zero-price markets cannot be calculated in terms of turnover, they are typically calculated as shares of volume of transactions or shares of users. When user shares are more appropriate than shares of volume, it may be necessary to

¹⁶ This second reason may become less and less valid over time, as online service providers offer increasingly "frictionless" payment, such as payments based on contactless or fingerprint or face recognition technology, or subscription-based models.

¹⁷ See also Michal S. Gal and Daniel L. Rubinfeld, "The Hidden Costs of Free Goods: Implications for Antitrust Enforcement", 2016 Antitrust Law Journal 521, at 530: "free is not simply one point on the continuum of low cost alternatives. Discounts to zero may have a much larger effect on demand than they save the consumer in actual monetary terms and cannot be explained by a classic analysis of rational consumer behavior".

¹⁸ Market Definition Notice, cited above, para. 15.

¹⁹ T-699/14 *Topps*, ECLI:EU:T:2017:2, para. 82.

²⁰ Contribution from the European Union to the OECD roundtable on market definition, document no. DAF/COMP/WD(2012)28, 2012, para. 17.

distinguish "single-homing" users from "multi-homing" users, and to distinguish between active users and dormant users.²¹

4. Effects on the quality of zero-price services

4.1. Harm to quality

25. While the five parameters of competition are price, output, quality, choice, and innovation, the notion of quality in the context of zero-price services can be difficult to distinguish from choice and innovation. As the Commission underlined in a submission to a previous OECD roundtable,

*"the exact boundaries between the product quality, product variety and innovation are not always entirely clear. Indeed, innovation is a process inherently linked to enhancing product quality. Similarly, product variety may mean that several products of different qualities are present on the market, and consumers can choose from these varieties. The harmful effect of an anti-competitive agreement or a merger may comprise the reduction of choice or the reduction of innovation or both, which can inherently be translated into a reduction of quality."*²²

26. In sum, in some circumstances, negative effects on choice and innovation could be seen as harm to quality as well.

27. Moreover, in the online advertising-supported sector, the notion of harm to quality encompasses not only the intrinsic characteristics of a service – e.g. speed and accuracy of results in a search engine, or a browser's page rendering speed – but also all costs that the consumer has to bear to be able to use such services. For example, a majority of EU consumers view pervasive online targeted advertising as an irritant, as it captures consumers' attention and personal data.²³

- First, online ads capture consumers' attention in terms of screen space devoted to ads, as evidenced in eye-tracking studies.²⁴ Because of ads getting in the way, consumers may need to use more eye movements, more scrolling, and more clicking to view content. Moreover, consumers may have to spend time watching an ad before the browser or app reaches the content that the consumer wants to see ("interstitial ads"). Consumers may also have to expend mental energy to figure out whether a particular box or text or image is an ad or legitimate content. Indeed, consumers' attention may be absorbed by commercial content that is disguised as "organic" content, such as "native" advertising or paid "influencers". In sum,

²¹ See also Andrea Prat and Tommaso Valletti, "Attention Oligopoly", working paper, 16 August 2018, available at <https://ssrn.com/paper=3197930>.

²² Contribution from the European Union to the OECD roundtable on "The Role and Measurement of Quality in Competition Analysis", document no. DAF/COMP(2013)17, 2013.

²³ Special Eurobarometer survey no. 447 on "Online platforms", June 2016, page 62.

²⁴ See e.g. Chun-Chia Wang and Jason C. Hung, "Comparative analysis of advertising attention to Facebook social network: Evidence from eye-movement data", forthcoming in *Computers in Human Behavior*, with further references.

capturing someone's attention imposes direct costs on her in terms of time and energy.

28. Second, some consumers may experience data collection as a degradation of quality in terms of data protection. Furthermore, what matters to those consumers is not necessarily only *how much* data is collected. It is also *how protectively* those data are being treated – how long and how securely they are being stored, with whom they are shared, for what purposes, and whether consumers are being adequately informed about all this.²⁵

29. Third, online ads also impose costs on consumers in terms of data traffic and battery power.²⁶ These may constitute significant transaction costs.

30. In conclusion, it matters little whether capturing consumers' attention and data, and using up consumers' data traffic and battery power, are seen as a "price", a "cost", "consideration", "counter-performance", or a degradation of quality. What matters is that while consumers enjoy value from some digital services, they may also experience a reduction of value in other – sometimes indirect and less obvious – ways from using such digital services. When such value reduction stems from an agreement, an abuse of dominant position, or a merger, there may be a case for competition enforcement.

4.2. Quality improvements as efficiencies

31. Under EU competition law, there is an efficiency defence under Articles 101 and 102 as well as under merger control.²⁷ The legal test for demonstrating an efficiency defence is largely the same across all three instruments, as it is derived from the text of Article 101(3). As in all markets, quality improvements resulting from agreements, unilateral behaviour, or mergers involving zero-price services may qualify as efficiencies for the purpose of the efficiency defence.

5. Quality considerations in the main EU antitrust cases involving digital zero-price services

32. One could imagine cases where quality degradation is at the core of the antitrust theory of harm in a zero-price product or service. That would be the case, for example, where firms collude to degrade quality, or where a dominant firm is "directly or indirectly imposing unfair purchase or selling prices *or other unfair trading conditions*" with regard

²⁵ IT security is an element of data protection: see GDPR, cited above, section 2. A firm that has market power may have less incentive to invest in IT security, just as it may have less incentive to invest in other aspects of quality.

²⁶ Businesswire, "Advertising Consumes 23% of Mobile Phone Battery Power", 25 June 2013; and Lara O'Reilly, "Ads on news sites gobble up as much as 79% of users' mobile data", Businessinsider, 16 March 2016. Some online service providers agree with internet service providers (ISPs) that their apps' data traffic does not count towards subscribers' monthly data caps. This is known as zero-rating.

²⁷ See Article 101(3); Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7, para. 30; and Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5, para. 78.

to quality (Article 102(a), emphasis added). This type of abuse is usually called an "exploitative" abuse.

33. By contrast, the four main cases in which the Commission assessed quality considerations of digital zero-price services concerned exclusionary abuses. They are *Microsoft I* and *II*, *Google Shopping* and *Google Android*.²⁸

34. The *Microsoft I* case concerned an abuse in the relevant market for work group server operating systems and another abuse in the relevant market for media players. With regard to the latter, Microsoft's media player was tied to the Windows operating systems while other media players were downloadable for free from other sources. The Commission found that Microsoft committed an abuse of dominant position "by tying its Windows Media Player (WMP), a product where it faced competition, with its ubiquitous Windows operating system". Microsoft's behaviour discouraged Original Equipment Manufacturers (OEMs) from offering Windows PCs with other media players than WMP.

35. First, the General Court rejected Microsoft's argument that "consumers are not required to pay anything extra" for WMP.²⁹ In the Court's view,

*"it does not follow ... that consumers must necessarily pay a certain price for the tied product in order for it to be concluded that they are subject to [a tying abuse]."*³⁰

36. Second, the General Court noted that, without tying, OEMs and consumers would have been better able to choose media players, based on their own preferences, including with regard to quality.³¹ Indeed, the consequence of Microsoft's behaviour was that OEMs and consumers were discouraged from installing better-quality media players.

*"The Court observes that ... first, OEMs are deterred from pre-installing a second streaming media player on client PCs and, second, consumers have an incentive to use Windows Media Player at the expense of competing media players, notwithstanding that the latter players are of better quality."*³²

*"It follows from information communicated by Microsoft itself ... that the significant growth in the use of Windows Media Player has not come about because that player is of better quality than competing players or because those media players, and particularly RealPlayer, have certain defects."*³³

²⁸ Commission decision of 24.03.2004 in case 37792 *Microsoft (Microsoft I)*; Commission decision of 16.12.2009 in case 39.530 *Microsoft (tying) (Microsoft II)*; Commission decision of 27.06.2017 in case 39740 *Google Search (Shopping)*; Commission decision of 18.07.2018 in case 40099 *Google Android*. In *Microsoft II*, the Commission did not find an exclusionary abuse, but merely had concerns, which Microsoft chose to address by offering commitments. Since the *Google Android* decision is not published yet, the Commission is not able to provide as much detail on that case as on the other three cases.

²⁹ T-201/04 *Microsoft*, ECLI:EU:T:2007:289, para. 967.

³⁰ *Idem*, para. 969.

³¹ *Idem*, para. 923.

³² *Idem*, para. 971.

³³ *Idem*, para. 1057.

37. In *Microsoft II*, Microsoft committed to showing a "browser choice screen" for five years, to allow PC users "to choose which web browser(s) they want to install in addition to, or instead of, Microsoft's browser Internet Explorer".³⁴ The Commission defined the relevant market as the market for internet browsers, regardless of the fact that "All main web browsers for client PC operating systems can be downloaded free of charge from the internet".³⁵

38. While the *Microsoft II* decision does not mention quality, the theory of harm was that Microsoft engaged in a similar kind of tying as in *Microsoft I*. By doing so, Microsoft restricted customers' choice, including perhaps their choice of a better-quality browser than Microsoft's.

39. In its June 2017 decision concerning the *Google Shopping* case, the Commission found that "Google has abused this market dominance by giving its own comparison shopping service an illegal advantage. It gave prominent placement in its search results only to its own comparison shopping service, whilst demoting rival services. It stifled competition on the merits in comparison shopping markets."³⁶

40. Competition on quality was a key element of the case, as explained in this speech by DG COMP Director-General Johannes Laitenberger:

*"Google's own internal documents said that its price-comparison service was of bad quality. So, to give it a boost, Google chose to take out its price-comparison service from its search results and display it at the top of its search pages. Google Shopping results were not based on quality, they were based on Google's own interests. By doing so – and here I quote Commissioner Vestager – Google 'denied European consumers a genuine choice of services and the full benefits of innovation.'"*³⁷

41. Finally, in the July 2018 *Google Android* decision, the Commission found that Google committed an abuse of dominant position by tying its Google Search app and its Google Chrome browser to the Play Store on practically all Android devices sold in the European Economic Area. The Commission concluded that "Google's practice has therefore reduced the incentives of manufacturers to pre-install competing search and browser apps, as well as the incentives of users to download such apps", including apps that better matched consumers' quality preferences.³⁸

42. In sum, in *Microsoft I and II*, *Google Shopping*, and *Google Android*, the types of behaviour at issue made it more difficult for customers to choose services based on their

³⁴ Commission press release no. IP/09/1941 of 16.12.2009, "Antitrust: Commission accepts Microsoft commitments to give users browser choice".

³⁵ Commission decision of 16.12.2009 in case 39.530 *Microsoft (tying)*, para. 46.

³⁶ Commission press release no. IP/17/1784 of 27.06.2017, "Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service".

³⁷ Johannes Laitenberger, "EU competition law in innovation and digital markets: fairness and the consumer welfare perspective", speech at the MLex/Hogan Lovells event on 10.10.2017.

³⁸ Commission press release no. IP/18/4581 of 18.07.2018, "Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine".

own quality preferences. Customers were being offered services that suited the dominant firm's own interests, instead of competition on quality. Moreover, because such behaviour was exclusionary, it was likely to further reduce incentives to innovate and compete on quality in the longer term.

6. Quality considerations in the main EU merger cases involving digital zero-price services

6.1. Legal framework for the assessment of non-price effects of mergers, including in zero-price markets

43. EU merger control rules provide an adequate framework for the assessment of non-price effects of mergers, including in zero price markets.

44. Pursuant to Article 2 of EU Merger Regulation ("EUMR"), the Commission has to declare a merger incompatible with the internal market if it would lead to a significant impediment to effective competition. The Guidelines on the Assessment of Horizontal Mergers (the "Horizontal Merger Guidelines") and the Guidelines on the Assessment of Non-Horizontal Mergers (the "Non-Horizontal Merger Guidelines") provide further guidance on the notion of "significant impediment to effective competition".

45. In particular, paragraph 24 of the Horizontal Merger Guidelines states that a merger may significantly impede effective competition by removing important competitive constraints on one or more sellers, who consequently have increased market power. Increased market power describes, among others, "the ability of one or more firms to profitably increase prices, reduce output, choice or quality of goods and services [or] diminish innovation" (see paragraph 8 of the Horizontal Merger Guidelines, emphasis added). Paragraph 24 of the Horizontal Merger Guidelines further clarifies that even where only increased prices are mentioned in the guidelines, this term would be "often used as shorthand for these various ways in which a merger results in competitive harm". The Non-Horizontal Merger Guidelines provide for the same overall framework when assessing vertical or conglomerate mergers.³⁹

46. Thus, the legal framework for EU merger control puts non-price effects, including affecting quality, on an equal footing with price effects when assessing potential harm and benefits of a proposed transaction. Therefore, in zero-pricing markets, where no monetary prices are charged to customers, the Commission is still allowed and obliged to assess effects of proposed transactions on quality and other non-price factors, resorting to the same framework applicable to markets where goods are sold against a monetary compensation.

6.2. European Commission's recent merger practice in zero-price markets

47. Non-price effects can become relevant in the review of a merger by the Commission and, in particular, they can play a role in the (i) definition of the markets; (ii) competitive assessment; and (i) the appraisal of efficiencies.

³⁹ First, the Non-Horizontal Merger Guidelines generally reference the guidance set out in the Horizontal Merger Guidelines. In addition, the same description of the term "increased market power" that is given in paragraph 8 of the Horizontal Merger Guidelines is repeated in paragraph 10 of the Non-Horizontal Merger Guidelines.

6.2.1. Market definition based on non-price elements

Product market

48. Factors other than price play a critical role in the definition of the scope of zero-pricing markets. A recent example is the acquisition of LinkedIn by Microsoft. In *Microsoft/LinkedIn*⁴⁰, the Commission assessed whether professional social networks form part of the same market as social networks in general. Both kinds of social networks are usually provided free of monetary charges.⁴¹

49. Based on its market investigation, the Commission found that professional social networks may constitute a separate product market in light of the "different functionalities, features and usage cases," such as the possibility to create and update a detailed resume and to search for job offerings.⁴²

50. In this example of social networks, the (base) price of using such networks is zero. However, more often, differences in non-price elements between two product markets are also reflected in price differences. Products of higher quality can be sold for a higher price. This, however, does not exclude that the main differentiating factor is differences in quality and thus in non-price elements.

51. As an example also from the area of electronic communications, in *Microsoft/Skype*⁴³, the Commission distinguished between enterprise communications services and consumer communications services. While consumer communication services are usually offered for free, enterprise communications services can be quite costly. However, as the decision explains, there are also significant quality differences as "Enterprises do not have the same service requirements and do not tolerate lower service quality as consumers do".⁴⁴ The Commission further noted that enterprise communications services offer additional features in terms of collaborating tools, such as the possibility to share and edit a document in real time from different places. This case is therefore an example in which the finding of a different product market can be considered to be mainly based on quality differences.

52. The Commission maintained the same distinction in *Microsoft/Nokia*⁴⁵ and based its conclusions on the results of market investigation, which – among other things – also concerned quality characteristics of communication services. For example, while ultimately leaving the market definition open, the Commission considered that there were indications that the market for consumer communications apps could be segmented by platform, also because the respondents to the market investigation indicated that certain communication apps perform better when running on PCs (as opposed to smartphones).⁴⁶

⁴⁰ Case M.8124 *Microsoft/LinkedIn*, Commission decision of 6 December 2016.

⁴¹ Case M.8124 *Microsoft/LinkedIn*, paragraph 87.

⁴² Case M.8124 *Microsoft/LinkedIn*, paragraph 101 and 115.

⁴³ Case M.6281 *Microsoft/Skype*, Commission decision of 7 October 2011.

⁴⁴ Case M.6281 *Microsoft/Skype*, paragraph 14.

⁴⁵ Case M.7047 *Microsoft/Nokia*, Commission decision of 4 December 2013.

⁴⁶ Case M.7047 *Microsoft/Nokia*, paragraphs 42-43.

Therefore, performance, and thus quality, was one of the factors taken into account by the Commission when assessing the scope of the product market.

53. However, price and non-price elements can also be unrelated elements in the assessment of the relevant product market definition. In *Facebook/WhatsApp*⁴⁷, the Commission discussed whether traditional electronic communication services like SMS or emails should be considered as part of the same market as consumer communication apps. The Commission took note of the fact that consumer communication apps provide additional functionalities to their users⁴⁸ and that the overall experience of the user is richer.⁴⁹ While consumer communications apps would be mainly offered free of charge, SMS are usually charged separately.⁵⁰ Although the Commission left the precise market definition open⁵¹, in this case price and non-price factors can be considered as separate elements in the Commission's assessment.

Geographic market

54. Non-price factors also play a role in the definition of geographic markets. In Commission's merger proceedings, the parties often argue that the relevant geographic markets are wide, even global, and the Commission carefully investigates such claims, by taking into account both price and non-price considerations, including whether the same functionalities are offered in a certain area.

55. For example, in *Microsoft/Skype*⁵², the Commission considered that the market for consumer communications services were at least EEA-wide, taking note of the fact that such services – mostly provided for free irrespective of the location of the customer – have limited differentiation in terms of quality and features across the EEA.

56. In *Facebook/WhatsApp*,⁵³ while there were indications that the market for consumer communications applications could be global in scope, the Commission defined it as EEA-wide, in line with a more conservative approach, because some apps enjoyed a greater reach than others in certain world regions. It also considered that, while generally offered for free, WhatsApp services were subject to a subscription-based model in some EU countries (Italy and United Kingdom at the time). The Commission concluded that this difference did not have an impact on the geographic scope of the market and ultimately dismissed a narrower market definition, in light of the experimental nature of such subscription-based model.

⁴⁷ Case M.7217 *Facebook/WhatsApp*, Commission decision of 3 October 2014.

⁴⁸ Case M.7217 *Facebook/WhatsApp*, paragraph 29.

⁴⁹ Case M.7217 *Facebook/WhatsApp*, paragraph 30.

⁵⁰ Case M.7217 *Facebook/WhatsApp*, paragraph 31. Even in case SMS would be offered as a bundle by the telecom operator, charges still usually apply for sending pictures (MMS) or messages to other countries.

⁵¹ Case M.7217 *Facebook/WhatsApp*, paragraph 33.

⁵² Case M.6281 *Microsoft/Skype*, paragraph 66.

⁵³ Case M.7217 *Facebook/WhatsApp*, paragraphs 36 et seq.

57. As an example where the Commission dismissed a wider definition of the geographic market based on non-price considerations, in *Microsoft/LinkedIn*⁵⁴ it concluded that the scope of the professional social networks was national also in light of the differences in terms of language, functionalities, legal/regulatory requirements and customers' preferences.

6.2.2. Competitive assessment of non-price effects

Non-price considerations

58. The Commission routinely considers non-price effects in its competitive assessment of mergers, where relevant, including in zero-pricing markets.

59. In the competitive assessment, quality can play an important role. In particular if differences in quality have not led to the finding of different product markets, quality differences within the same market can be informative as to whether the merging parties are close competitors.

60. For example, in *Microsoft/Skype*,⁵⁵ considerations related to both quality and price played a role in the Commission's assessment to rule out that the parties were close competitors. The Commission took into account that the parties' products offered different functionalities and that, while Microsoft's products were a paid solution, Skype's were offered for free or at a low price.

61. Furthermore, in *Facebook/WhatsApp*,⁵⁶ the Commission concluded that the parties were not close competitors based on the differences between their products, which related – among other things – to the user experience, which was richer for Facebook Messenger. The Commission also based its conclusion on the fact that customers of communications apps typically install and use several apps at the same time, thus "multi-homing". The parties' networks overlapped, which was considered as an indication that their products were somewhat complementary, rather than being in direct competition with each other.

Effects on innovation

62. The Commission assesses effects on innovation, where it is one of the key parameters of competition and risks to be negatively affected by the increased market power of the merged entity. The Commission considers that the general framework of the assessment set out in its Horizontal Merger Guidelines is also suitable for the innovation analysis. The precise tools for assessing each of the relevant elements in innovation cases may however differ from price competition cases.

63. With respect to markets where products or services are offered for free, the Commission analysed the possible effects on innovation vis-à-vis internet search users in *Microsoft/Yahoo Search Business*.⁵⁷ In particular, the Commission analysed whether the transaction would have influenced the incentive to innovate, to lower the quality of organic search (i.e. degrading the relevance of the results) and whether users would be harmed by

⁵⁴ Case M.8124 *Microsoft/LinkedIn*, paragraph 125.

⁵⁵ Case M.6281 *Microsoft/Skype*, paragraph 197.

⁵⁶ Case M.7217 *Facebook/WhatsApp*, paragraphs 101-106.

⁵⁷ Case M.5727 *Microsoft/Yahoo! Search Business*, Commission decision of 18 February 2010.

a loss of variety. Such theory of harm was dismissed because the Commission considered that Yahoo would still have the incentive to compete for users and thereby innovate post-transaction.

Effects on data protection and privacy

64. As discussed, many digital services are provided free of charge and are monetised through other means (for example via targeted advertising) based on personal data collected from users. A merger may potentially affect the scope and depth of such data collection.

65. The issues of data protection are not, as such, a matter for EU competition law.⁵⁸ They are specifically addressed by EU data protection law, in particular by the EU General Data Protection Regulation which applies from 25 May 2018. Competition law and data protection law have different objectives, rules and procedures. Irrespective of the outcome of the Commission's merger proceedings, the parties remain subject to EU data protection obligations.

66. That said, data protection and privacy may be relevant in the Commission's merger analysis when they relate to the competitive process. For example, privacy may be an important element of quality of a product/service or data may be a necessary input for other products/services. In such circumstances, as with other non-price factors, the Commission will take data-related issues into account in its merger assessment.

67. For example, in *Facebook/WhatsApp*⁵⁹, the Commission considered privacy as an element of quality of mobile communications apps, noting that it is valued by an increasing number of users. The greater privacy protection of WhatsApp was one of the elements for concluding that the parties were not close competitors; also the importance of privacy was a factor in finding that Facebook was unlikely to retract WhatsApp's plans to add end-to-end encryption and introduce targeted advertising on WhatsApp.

68. Similarly, when reviewing *Microsoft/LinkedIn*⁶⁰ in 2016, the Commission found that privacy was an important parameter of competition among professional social networks, in particular in certain EU Member States, such as Germany. The transaction would indirectly impair privacy since, through promoting LinkedIn on its operating system, Microsoft would foreclose and marginalise competing professional social networks, some of which offered greater privacy protection. Microsoft offered remedies allaying the foreclosure concerns and thus precluding adverse effects on privacy. In the same case, the Commission also looked at data as an asset and input when assessing horizontal non-coordinated concerns due to the combination of the parties' large datasets (in the market for online advertising) and vertical concerns due to Microsoft potentially denying access for competitors to the full LinkedIn dataset preventing the improvement of competitors' services (in the market for customer relationship managements software). However, these theories of harm were not confirmed by the investigation.

⁵⁸ See case C-238/05 *Asnef-Equifax*, ECLI:EU:C:2006:734, para. 63, where the European Court of Justice held that "since... any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection" (emphasis added).

⁵⁹ Case M.7217 *Facebook/WhatsApp*.

⁶⁰ Case M.8124 *Microsoft/LinkedIn*.

6.2.3. Non-price efficiencies

69. In addition to negative non-price effects, the Commission recognises that mergers may also result in non-price benefits to consumers, such as bringing new and improved products. Such positive effects are typically assessed by the Commission in the context of efficiency claims.⁶¹

70. There may be challenges in precise quantification of non-price efficiencies, such as quality improvements or introduction of new products. The parties should do their best to be as precise as possible in estimating the claimed efficiencies to enable the Commission to properly evaluate them. Nevertheless, the Horizontal Merger Guidelines leave some room for meeting the verifiability condition even if the precise quantification of efficiency is not reasonably possible due to the lack of data. In such circumstances, it is still necessary to be able "to foresee a clearly identifiable positive impact on consumers, not a marginal one".⁶² The more convincing the parties' evidence is (including qualitative), the greater the likelihood that the efficiency claims will be taken into account by the Commission. In recent cases the Commission did not face the issue of having to weigh price effects of a merger, on the one hand, and non-price efficiencies, on the other hand.

71. The Commission examined the claims regarding non-price efficiencies in the market for online advertising, where on the user side searches are offered free of charge. In its review of *Microsoft/Yahoo Search Business* in 2010, which combined two important online search engines, the Commission considered Microsoft's arguments that the transaction would enable Microsoft to acquire additional scale and thus provide greater value to both users of search engines and online advertisers. According to Microsoft, on the one hand, increased traffic volumes would make more experiments possible, leading to improved search results and, on the other hand, a higher degree of user engagement would have a positive effect on advertisers' return on investment.

72. Overall, the Commission's market investigation confirmed that scale was an important factor in order to be an effective competitor in this sector. The market investigation further confirmed that the proposed transaction was perceived as having pro-competitive effects, as it would have created a stronger competitor to Google. However, ultimately, the Commission did not adopt a final position on the potential beneficial non-price effects of the transaction, as its unconditional clearance was based on other elements

⁶¹ The Commission has examined efficiency claims related to innovation in non zero-pricing markets. In *TomTom/TeleAtlas* (case M.4854, Commission decision of 14 May 2008), the parties claimed that innovation efficiencies were the main deal rationale (i.e., information obtained from TomTom's users could be used to improve quality and timing of TeleAtlas' maps). While the Commission did not reach a definitive conclusion on this point as the parties' quantifications were not convincing, it did acknowledge that the innovation efficiencies were at least partly merger-specific and brought consumer benefits.

⁶² Horizontal Merger Guidelines, paragraph 86.